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No. 880

In the Supreme Court of the United States

OCTOBER TERM, 1960

JAMES F. McMANUS, PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 23–31) is reported at 286 F. 2d 414.

JURISDICTION

The judgment and decree of the court of appeals was entered on February 21, 1961 (Pet. 32). The petition for a writ of certiorari was filed on April 7, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board has power under Sections 412 and 414 of the Federal Aviation Act to approve

agreements among air carriers regarding their use of ticket agents.

2. Whether the court of appeals properly held that petitioner's contentions with respect to resolutions of the International Air Transport Association were either premature or of no applicability to petitioner.

STATUTES INVOLVED

The pertinent statutory provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301, *et seq.*, are as follows:

POOLING AND OTHER AGREEMENTS

FILING OF AGREEMENTS REQUIRED

SEC. 412. (a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competion, or for regulating stops, schedules, and character of serv-

ice, or for other cooperative working arrangements.

APPROVAL BY BOARD

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it. [49 U.S.C. 1382]

LEGAL RESTRAINTS

SEC. 414. Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order. [49 U.S.C. 1384]

STATEMENT

At issue in this case are seven orders issued by the Civil Aeronautics Board during its consideration of resolutions of the Air Traffic Conference of America (hereinafter ATC) and the International Air Transport Association (hereinafter IATA), trade associations of air carriers engaged respectively in domestic and international operations. The associations had been formed to take joint action on industry-wide problems. In the resolutions involved here, the associations established criteria and procedures for the selection, appointment, and retention of ticket agents, and provided that no member of an association could appoint or retain a travel agent who had not applied to that association and been approved by it.

The original resolution establishing this procedure was drawn up by ATC in 1940 and submitted for the approval of the Civil Aeronautics Board under Section 412 of the Civil Aeronautics Act of 1938, 52 Stat. 1004, *supra,* pp. 2–3.[1] On April 18, 1941, the Board granted its approval (Order No. 983), which, under the provisions of Section 414 of that Act, 52 Stat. 1004, *supra,* p. 3, had the effect of immunizing the agreements from liability under the antitrust laws. Subsequent agreements similar in substance were approved in 1945 and 1951. After having received complaints regarding the procedures instituted by the conference agreements, the Civil Aeronautics Board issued an order on October 31,

[1] The relevant provisions of the Civil Aeronautics Act of 1938 were subsequently taken over without change as similarly numbered paragraphs of the Federal Aviation Act of 1958. See *supra*, pp. 2–3.

1956, instituting an investigation to determine whether the conference system for qualifying ticket agents established by the ATC resolution was in the public interest. Various parties, including petitioner, were permitted to intervene, public hearings were held, and briefs were filed.

In an Initial Decision on November 3, 1958, the Hearing Examiner held that the ATC resolution was not adverse to the public interest and should be approved by the Board provided that certain major amendments were made to afford greater protection to parties seeking to become approved ticket agents. This decision was substantially adopted by the Civil Aeronautics Board in Order No. E–14012 (June 10, 1959), which kept the record open for sixty days to permit the ATC to file the required amendments. Two supplemental orders, No. E–14647 (November 12, 1959) and No. E–14924 (February 15, 1960), modified the order of June 10 by directing that certain additional amendments to the resolutions be filed. On April 22, 1960, the Board dismissed petitioner's motion seeking review of the decision of the Board's Chief of Compliance not to institute enforcement proceedings against the ATC for violating the Federal Aviation Act by acting under the approved resolution (Order No. E–15143). The court of appeals held that these orders were within the power of the Board (Pet. 28–31).

Petitioner also seeks review of three orders issued in the course of the Board's consideration of the related IATA resolution which the Board had earlier approved on January 26, 1951 (Order No. E–5083).

At the same time as it authorized the ATC investigation, the Board instituted an investigation of the similar resolution of the IATA. No further steps were taken with respect to the IATA resolution during the pendency of the ATC investigation. In 1958 petitioner demanded an immediate hearing with oral argument on a motion he had filed with the Board requesting it to withdraw its approval of the IATA resolution.

Having decided to proceed with the IATA investigation after the completion of the ATC case, the Board denied petitioner's request on June 1, 1959 (Order No. E–13959). On September 10, 1959, the Board granted petitioner leave to intervene, but denied his motions that the Board immediately withdraw its approval of the IATA resolution, that the Board's vote on an earlier motion be entered on the record, that copies of certain correspondence be made part of the record, and that the notice for a prehearing conference which had been scheduled be vacated (No. E–14436). The appeal from these orders was dismissed by the court of appeals on the ground that the orders were not final, since they did not deny or fix any legal relationship, and could be reviewed after the final determination of the Board (Pet. 27–28).

On September 30, 1959, the Board approved certain IATA resolutions relating to sales agents "except as they apply to the United States." (Order No. E–14508). The court of appeals dismissed the appeal from this order on the ground that petitioner, having no travel agencies outside the United States, was completely

unaffected by it and therefore did not have the substantial interest required as a prerequisite to court review by Section 1006(a) of the Federal Aviation Act, 49 U.S.C. 1486(a) (Pet. 26–27).[2]

ARGUMENT

While petitioner has raised a number of interrelated questions concerning the Board's actions, the only issue warranting detailed consideration is whether the Board's authority under Section 412 of the Act, *supra*, pp. 2–3, to approve agreements among carriers, where it does not find them to be adverse to the public interest or otherwise in violation of the Act, extends to agreements concerning the conditions under which such carriers will utilize the services of ticket agents. The language of Section 412, giving the Board authority to approve air transportation agreements for pooling service, relating to the establishment of transportation fares, charges, and classifications, preserving and improving efficiency of operation, controlling destructive competition, and regulating the character of service, is certainly broad enough to include appropriate regulation of ticket agency practices. The intimate and direct relation-

[2] On April 27, 1961, petitioner instituted a new action in the court below (*McManus* v. *Civil Aeronautics Board*, Case No. 26934 (C.A. 2)), attacking Board Order No. E–16459 (March 1, 1961). This order held, as in the case of ATC, that continued approval of the resolution relating to ticket agents would depend upon the substantial modification of the existing IATA resolution. Petitioner's new action also attacks Order No. E–16545 (March 23, 1961) which approved various other IATA agreements.

ship between air carriers and ticket agents in the operation of the highly competitive air transportation services was expressly recognized by the 1952 Amendment, 66 Stat. 628, to Section 411 of the Act, 49 U.S.C. 1381, where the Board was empowered to order ticket agents, in addition to air carriers, to cease and desist from "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof." This Court itself has recognized that ticket sales are an integral part of carrier service. See, *e.g.*, *McCall* v. *California*, 136 U.S. 104; *DiSanto* v. *Pennsylvania*, 273 U.S. 34.

Petitioner's contentions that the broad language of Section 412 should nonetheless be limited to exclude reasonable carrier agreements regulating their relations with ticket agents is contrary to all of the decided cases. *United States Lines Co.* v. *Civil Aeronautics Board*, 165 F. 2d 849 (C.A. 2); *Putnam* v. *Air Transport Ass'n of America*, 112 F. Supp. 885 (S.D. N.Y.); *Apgar Travel Agency, Inc.* v. *International Air Transp. Ass'n*, 107 F. Supp. 706 (S.D. N.Y.). And as the court of appeals held (Pet. 30), while it might be argued that "airlines should not be permitted to exercise concerted control which is immune from antitrust regulation over some related industry such as that of ticket agencies * * * there is no indication in either the words of the statute or in its legislative history[3] that would justify [such a] reading * * *."

[3] The 1957 report of a subcommittee of the House Committee on the Judiciary, cited by petitioner (Pet. 11–13), is not part of the legislative history of the section. Moreover, while it disagrees with the Board's action in approving the original

Petitioner's other contentions with respect to the modified ATC order are clearly without merit. As the court of appeals held (Pet. 31), "the [Board's] power to condition its approval on the incorporation of certain amendments is necessary for flexible administrative action and is inherent in the power to approve or disapprove." While petitioner claims that Congress unconstitutionally delegated its legislative power, the only delegation of power is to the Board not to the trade associations, since it is the Board which approves or disapproves the resolutions. If the resolutions are approved, the associations are merely allowed to act in a way which would be permissible in the absence of the antitrust laws. Congress has the power to authorize an agency, such as the Board, to grant immunity from the antitrust laws (see *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 396), and the public interest standard, which the Board applies under Section 412(b) in determining whether to approve or disapprove an agreement, is of sufficient specificity to withstand petitioner's constitutional attack. See *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 24; *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225–226.

Finally, the court of appeals clearly was correct in dismissing petitioner's several challenges to orders

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ATC and IATA agreements, the report recognizes (Pet. 13) that the Board has authority under Section 412 to approve air carrier agreements which establish standards governing their relations with ticket agents.

involving IATA resolutions as either without impact upon petitioner (Pet. 26–27; see *supra*, pp. 6–7) or as interlocutory and lacking in finality (Pet. 27–28; see *supra*, p. 6).

CONCLUSION

For the foregoing reasons, we submit that the petition for a writ of certiorari should be denied.

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